

1 KAREN P. HEWITT
2 United States Attorney
2 PAUL S. COOK
3 Assistant U. S. Attorney
3 California Bar No. 79010
4 Federal Office Building
4 880 Front Street, Room 6293
5 San Diego, California 92101-8893
5 Telephone: (619) 557-5687
6 pcook@usdoj.gov

7 Attorneys for the United States of America

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) Criminal Case No. 07cr3056-WQH
11)
12 Plaintiff,) DATE: DECEMBER 17, 2007
13 v.) TIME: 2:00 p.m.
14)
15 ELOISE BIERLY ADAME, (1))
16 STEVEN DANIEL BIERLY (2),) GOVERNMENT'S RESPONSE AND
17) OPPPOSITION TO DEFENDANT'S
18) MOTIONS:
19)
20 Defendants.) (1) TO COMPEL DISCOVERY
21) (2) FOR LEAVE TO FILE FURTHER
22) MOTIONS
23)
24) TOGETHER WITH STATEMENT OF FACTS,
25) MEMORANDUM OF POINTS AND
26) AUTHORITIES AND GOVERNMENT'S
27) MOTIONS FOR RECIPROCAL DISCOVERY
28)

21 The United States of America, by its counsel, Karen P. Hewitt,
22 United States Attorney, and Paul S. Cook, Assistant United States
23 Attorney, hereby responds to and opposes Defendant's Motions: To
24 Compel Discovery and For Leave To File Further Motions. This response
25 and opposition is based upon the files and records of the case,
26 together with the attached statement of facts and memorandum of points
27 and authorities. The Government also hereby files its motion for
28 reciprocal discovery.

I

STATEMENT OF FACTS

3 On Friday, October 10, 2007 at 9:41 p.m., the Defendant Eloise
4 Bierly drove her Chevrolet Suburban into the United States from Mexico
5 at the Calexico, California, East Port of Entry. Her husband,
6 Defendant Steven Bierly, was a passenger in the car. Eloise Bierly
7 told the Officer that they had been visiting family in Mexicali. The
8 car was randomly selected for a secondary inspection, and was directed
9 to the secondary lot. The Primary Officer noticed that the defendant
10 drove extremely slowly toward the secondary lot. In Secondary, Eloise
11 Bierly admitted that the car was hers, and again stated that they were
12 returning home from visiting relatives in Mexicali. A narcotic
13 detector dog alerted to the gas tank area of the Suburban, and both
14 defendants were escorted to the office. Officers noticed signs of
15 tampering with the gas tank, tapped it and detected that it was hard
16 and rigid. The gas tank was removed, and officers discovered 36
17 packages of marijuana in vacuum sealed bags ,weighing approximately
18 61 kilograms inside the tank. Also seized from the defendants were
19 \$965.00 and several cell phones. Both defendants were advised of
20 their Miranda rights, invoked, and the interviews were terminated.

II

THE GOVERNMENT HAS AND WILL CONTINUE TO COMPLY WITH
ITS DISCOVERY OBLIGATIONS

24 The United States is aware of its discovery obligations, and will
25 continue to comply with its obligations under Brady v. Maryland, 373
26 U.S. 83 (1963), the Jencks Act (18 U.S.C. §3500) and Rule 16 of the
Federal Rules of Criminal Procedure, and will continue to comply with

1 all discovery rules. The United States has provided Defendants with
2 109 pages of discovery and a CD of Defendants' interviews. The
3 discovery contains the arrest reports, Defendant's criminal record,
4 description of evidence seized and photographs of the vehicle and
5 drugs. Regarding certain specific requests made by the Defendant, the
6 United States responds as follows:

7 1. Rule 404(b) Evidence

8 The Government will provide Defendants with notice of its intent
9 to present evidence pursuant to Rule 404(b) three weeks before trial
10 or as otherwise ordered by the Court.

11 2. Evidence Seized and Preservation

12 The Government will preserve all evidence seized from the
13 Defendant, who in turn may make an appointment, at a mutually
14 convenient time, to inspect the evidence (copies of items seized from
15 the defendants have been provided in discovery). ICE has notified the
16 United States Attorney's Office that it intends to destroy the seized
17 drugs and may administratively forfeit the vehicle sixty days from
18 October 10, 2007. The Government has requested that the case agent
19 preserve the car until the case is finally disposed of. If Defendants
20 want the entire amount of the seized marijuana preserved for re-
21 testing or re-weighing, the Government would not oppose a Court Order
22 to this effect, if Defendants seriously contest either the weight or
23 that the substance seized is marijuana, otherwise there is no need to
24 re-weigh or re-analyze.

25 3. Tangible Objects

26 The Government will provide copies of or an opportunity to
27 inspect all documents and tangible things material to the defense,

1 intended for use in the Government's case in chief, or seized from
2 Defendant.

4. Expert Witnesses

4 The Government will notify Defendant of its expert witnesses,
5 such as the DEA chemist and drug value expert, and will comply with
6 Fed. R. Crim. P. 16(a)(1)(G).

5. List and Addresses of Witnesses

8 The Government has provided Defendant with the investigative
9 reports relating to this crime. These reports include the names of
10 the law enforcement personnel, eye witnesses and other people
11 interviewed as part of the follow-up investigation. The Government
12 will provide Defendant with a list of all witnesses which it intends
13 to call in its case-in-chief at the time the Government's trial
14 memorandum is filed, although delivery of such list is not required.

15 See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United

16 States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v.

17 Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not

18 entitled to the production of addresses or phone numbers of possible

19 Government witnesses. See United States v. Hicks, 103 F.3d 837, 841

20 (9th Cir. 1996) ("A district court that orders the Government and the

21 defendant to exchange witness lists and summaries of anticipated

22 witness testimony in advance of trial has exceeded its authority under

23 Rule 16 of the Federal Rules of Criminal Procedure and has committed

24 error."); United States v. Thompson, 493 F.2d 305, 309 (9th Cir.1977).

25 Federal Rule of Criminal Procedure 16 does not require the
26 government (or the defense) to disclose the names and addresses of
27 witnesses pretrial. Indeed, the Advisory Committee Notes reflect that

1 the Committee rejected a proposal that would have required the parties
 2 to exchange the names and addresses of their witnesses three days
 3 before trial:

4 The House version of the bill provides that each party, the
 5 government and the defendant, may discover the names and
 6 addresses of the other party's witnesses 3 days before
 7 trial. The Senate version of the bill eliminates these
 8 provisions, thereby making the names and addresses of a
 9 party's witnesses nondiscoverable. The Senate version also
 10 makes a conforming change in Rule 16(d)(1). The Conference
 11 adopts the Senate version.

12 A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

13 United States v. Napue, 834 F.2d 1311, 1317-19 (7th Cir. 1987)
 14 (quoting Rule 16 advisory committee notes) (emphasis added).

15 The Government will not provide Defendants with names and
 16 addresses of witnesses it does not intend to call.

17 6. Informant Information

18 The Government will comply with this request to the extent that
 19 any informants or cooperating witnesses are percipient witnesses, have
 20 given Brady material to Government agents or are called by the
 21 Government to testify. The Government, at this time, is unaware of
 22 an informants in this case.

23 III

24 LEAVE TO FILE FURTHER MOTIONS

25 The Government has no objection to this motion.

1 IV
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34 THE GOVERNMENT'S MOTION FOR RECIPROCAL
5 DISCOVERY SHOULD BE GRANTED
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28 The discovery provided to Defendants, at their request, includes
documents and objects which are discoverable under Rule 16(a)(1)(E).
Consequently, the Government is entitled to discover from the
defendant any books, papers, documents, data, photographs, tangible
objects, buildings or places, or copies or portions of any of these
items that are in Defendant's possession, custody or control and which
Defendant intends to use in the Defendant's case-in-chief. See Rule
16(b)(1)(A), Fed. R. Crim. P..

Fed. R. Crim. P. 26.2 requires the production of prior statements of all witnesses, except Defendants'. The new rule thus provides for the reciprocal production of Jencks statements. The time frame established by the rule requires the statement to be provided after the witness has testified, as in the Jencks Act. Therefore, the United States hereby requests that Defendants be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. This order should include any form these statements are memorialized in, including but not limited to, tape recordings, handwritten or typed notes or reports.

V

CONCLUSION

3 For the above stated reasons, the Government respectfully
4 requests that the Defendant's motions be denied, except where
5 unopposed, and the Government's motion for reciprocal discovery be
6 granted.

Date: December 10, 2007.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Paul S. Cook
PAUL S. COOK
Assistant United States Attorney

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF CALIFORNIA

3 UNITED STATES OF AMERICA,) Case No. 07CR3056-WQH
4 Plaintiff,)
5 v.)
6 ELOISE BIERLY (1),)
7 STEVEN DANIEL BIERLY (2),)
8 Defendants.)

9

10 IT IS HEREBY CERTIFIED THAT:

11 I, Paul S. Cook, am a citizen of the United States and am at
12 least eighteen years of age. My business address is 880 Front Street,
13 Room 6293, San Diego, California 92101-8893.

14 I am not a party to the above-entitled action. I have caused
15 service of Government's Response and Opposition to Defendant's Motions
16 on the following party by electronically filing the foregoing with the
17 Clerk of the District Court using its ECF System, which electronically
18 notifies them.

19 1. FREDERICK M. CARROLL
20 2. JASON SER

21 I declare under penalty of perjury that the foregoing is true and
22 correct.

23 Executed on December 10, 2007.

24 s/Paul S. Cook
25 PAUL S. COOK